

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FWK HOLDINGS, L.L.C.,

Plaintiff,

v.

ACTAVIS ELIZABETH, LLC, et al.,

Defendants.

16 CV 09901 (JSR)
17 CV 00078 (JSR)
17 CV 00980 (JSR)
17 CV 01039 (JSR)

Conference

New York, N.Y.
February 21, 2017
11:35 a.m.

Before:

HON. JED S. RAKOFF

District Judge

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1 (Case called)

2 THE COURT: Good morning. We have two new complaints
3 that have been filed. My first suggestion is that we
4 consolidate all these actions for all purposes under the title
5 In re Actavis Antitrust Litigation. Any objection?

6 MR. NALVEN: Your Honor, there were direct purchasers
7 and indirect purchasers each proceeding as a class. We would
8 recommend that the direct purchaser cases be consolidated and
9 the indirect purchaser cases be consolidated but that the
10 direct purchaser and indirect purchase cases be coordinated for
11 all purposes.

12 THE COURT: Why?

13 MR. NALVEN: There are differences in the pleadings.
14 For example, the direct purchasers are proceeding under federal
15 and state law whereas the indirect purchasers are proceeding only
16 under federal law.

17 THE COURT: Don't you anticipate that if the case will
18 go to trial, a great deal of the evidence will be identical in
19 both cases?

20 MR. NALVEN: Yes, your Honor, certainly much of the
21 liability evidence.

22 THE COURT: So why don't we consolidate for all
23 purposes? We can have two classes if that turns out to be the
24 situation.

25 MR. NALVEN: The direct purchasers' position would be

1 that the cases should not be tried together.

2 THE COURT: Why not?

3 MR. NALVEN: Among other things, there is the Illinois
4 pass-on issue, so direct purchasers and indirect purchasers
5 should not be trying the cases together.

6 THE COURT: I'm sorry. I may not be familiar with
7 that. You say there is a case that says they shouldn't be
8 tried together?

9 MR. NALVEN: Your Honor, under the Illinois Brick and
10 Hanover Shoe cases and their progeny, the defendants are barred
11 from asserting a defense based on the pass-on of on overcharge.
12 In consequence, the direct purchasers' position would be that
13 the cases should not be tried together.

14 We can coordinate for purposes of discovery. We can
15 certainly coordinate to a large extent for purposes of summary
16 judgment. Class issues will be different. But for trial, it
17 is our position that they should not be tried together.

18 THE COURT: I hear what you are saying, but I don't
19 think you are saying that those cases say that. You're saying
20 that because there is a certain defense available to the
21 defendants with respect to indirect purchasers that is not
22 available for direct purchasers, the cases should not be tried
23 together. I don't see why that should be so. If the great
24 bulk of the proof is going to be the same, why should we have
25 two trials?

1 MR. NALVEN: Your Honor, let me suggest this. Trial
2 is somewhat in the distance.

3 THE COURT: Oh, no. We are setting today the date for
4 the trial, I guarantee you.

5 MR. NALVEN: Your Honor, we would request that we be
6 permitted to brief the issue as to whether the direct purchaser
7 and the direct purchaser cases should be tried together. We
8 certainly agree that the cases should be coordinated for
9 discovery purposes, for deposition and document production
10 purposes.

11 THE COURT: Let me find out, is there any other
12 opposition to consolidation for all purposes?

13 MR. GIRARD: Your Honor, my name is Dan Girard
14 speaking for the indirect purchasers. If Mr. Harvey has a
15 different view, I will invite him to express that, since he has
16 filed on behalf of a different client. I think these are
17 matters that fall within the Court's discretion in terms of how
18 to structure the pretrial proceedings. If the Court wants it
19 in a single complaint, we will do it that way.

20 Most of the time these have been done in separate
21 complaints just because I think conceptually it is easier since
22 the classes are distinct classes. But as Mr. Nalven says, the
23 cases can and should proceed on a coordinated basis. If your
24 Honor's view is that they should be consolidated for all
25 purposes, we can do it that way. I just think that by and

1 large most of these have been done in coordination but as
2 separate complaints because of the fact that the classes are
3 different. That is really all I have to say.

4 THE COURT: I will for today's purpose treat the cases
5 as coordinated. I will allow any party who thinks they should
6 not be consolidated for all purposes, including trial, to send
7 me letters not to exceed three single-spaced pages by Friday,
8 and I'll take a look at them and make a decision.

9 MR. NALVEN: Thank you, your Honor.

10 THE COURT: In terms of coordination, the Court
11 previously entered a case management plan. The original case
12 management form required the case to be ready for trial on June
13 6th of this year. The then parties convinced me to extend that
14 to September 6th. I'm not going to extend it any further.

15 But with respect to the new parties, I will extend the
16 date for the filing of any document requests or
17 interrogatories, which were due on January 23rd -- first
18 request for production of documents but the sole request for
19 interrogatories, which are limited to the very limited
20 interrogatories under local rule 33.3(a) -- I will extend that
21 to this Friday as well. All other dates in the case management
22 plan will remain in effect and govern the new cases as well,
23 and all depositions must be joint for all parties.

24 MS. ALLON: Your Honor, we have a motion to dismiss
25 that has been fully briefed.

1 THE COURT: Yes. I'm going to get to that in a
2 minute.

3 MS. ALLON: I'll wait.

4 THE COURT: We have a motion to dismiss that is going
5 to be heard this Friday. Do you want to make a separate motion
6 to dismiss with regard to the new complaints?

7 MS. ALLON: Yes, your Honor.

8 THE COURT: When would you like to file it?

9 MS. ALLON: We could file it in three weeks.

10 THE COURT: No.

11 MS. ALLON: Two weeks.

12 THE COURT: No, but you're going in the right
13 direction.

14 MS. ALLON: Ten days?

15 THE COURT: I was going to say one week, but you wore
16 me down. Ten days.

17 MS. ALLON: Thank you, your Honor.

18 THE COURT: Today is the 21st. That would be March
19 3rd. Answering papers?

20 MR. GIRARD: Can I make a suggestion, your Honor?

21 THE COURT: Yes.

22 MR. GIRARD: With respect to the two indirect
23 purchaser cases, I thought we would offer to file a con-
24 solidated complaint that would bring the two cases together.
25 We could do that by Monday.

1 THE COURT: No, I'm not going to wait until Monday.

2 MR. GIRARD: How about Friday?

3 THE COURT: Friday is fine.

4 MR. GIRARD: The up side is they could move on a
5 single pleading.

6 THE COURT: Friday is fine.

7 MR. GIRARD: Thank you, your Honor.

8 THE COURT: I will give defense counsel, before she
9 even asks, till Tuesday, March 7th, for your moving papers.

10 How long does plaintiffs' counsel want for answering
11 papers?

12 MR. GIRARD: Two weeks, your Honor. I think that is
13 the same timing that applied for the direct.

14 THE COURT: Yes, but you came in late and you are
15 disrupting the entire proceedings here in ways that is fair
16 enough, but you will suffer the consequences. Ten days. March
17 17th.

18 MR. GIRARD: Very well, your Honor. Thank you.

19 THE COURT: Reply papers March 22nd. And we'll have
20 oral argument on March 24th at 2 p.m.

21 On the assumption that there will be one trial,
22 although of course plaintiffs' counsel may convince me
23 otherwise --

24 MR. FOLIO: Your Honor, Joseph Folio on behalf of the
25 government. I wanted to bring one issue to your Honor's

1 attention. The government recently moved to intervene in this
2 matter and your Honor granted that motion.

3 THE COURT: Yes.

4 MR. FOLIO: The government has been conferring with
5 plaintiffs, the two existing plaintiffs, as well as all
6 defendants about moving for a limited stay of discovery.

7 THE COURT: The likelihood of your prevailing on that
8 is about zero, but I'll be happy to hear you. Why don't you
9 come to the front here.

10 MR. FOLIO: Your Honor, the government intends to move
11 for a limited stay of discovery. We are in the final process
12 of conferring with all parties in hopes of submitting --

13 THE COURT: How about conferring with me? What
14 possible reason would I have for granting a stay?

15 MR. FOLIO: Your Honor, you have the broad discretion
16 to grant --

17 THE COURT: I know I have the power. I'm just saying
18 what is the reason I would want to grant a stay? This case is
19 already much delayed. As far as I'm concerned, it should have
20 been tried in June.

21 MR. FOLIO: Understood, your Honor. The reason for
22 the request for the stay is the government's ongoing criminal
23 investigation and overlap of that investigation and this case.

24 THE COURT: You don't have an indictment, do you?

25 MR. FOLIO: Your Honor, the government unsealed its

1 first two criminal charges on December 14th in the Eastern
2 District of Philadelphia against two former executives of
3 defendant Heritage Pharmaceutical.

4 THE COURT: I saw that. But you haven't filed any
5 indictment involving the companies here, have you?

6 MR. FOLIO: That's correct, your Honor. However, the
7 government's ongoing investigation is much broader than the
8 informations that were unsealed.

9 THE COURT: You will be thrilled because you will have
10 the benefit of the discovery in this case. You should be
11 asking me to move ahead full steam so that you can have the
12 benefit of all the deposition testimony that will be gathered
13 here.

14 MR. FOLIO: Your Honor, we think in some sense that is
15 exactly right.

16 THE COURT: Good. Then we are in agreement and you
17 withdraw your motion?

18 MR. FOLIO: Unfortunately, not entirely, your Honor.
19 I think there are points in which we are in agreement. For
20 example, I think in large part -- again, this is still the
21 subject of negotiations between the parties -- the government
22 is fine with allowing document discovery to go forward with
23 some small exceptions.

24 THE COURT: I don't understand what the possible
25 interest of the government is in staying this case.

1 MR. FOLIO: The issues, your Honor, are the overlap
2 with the government's ongoing criminal investigation.

3 THE COURT: So what? Parallel proceedings happen all
4 the time.

5 MR. FOLIO: Yes, your Honor, they do. However, at
6 different points in the government's ongoing criminal
7 investigation civil proceedings may risk the integrity of that
8 investigation.

9 THE COURT: In what way?

10 MR. FOLIO: Specifically, your Honor, sworn statements
11 by people who are cooperating with the government's
12 investigation.

13 THE COURT: So what? So some cooperators may actually
14 have to make statements in advance of the criminal trial? I'm
15 all aflutter with terror at that prospect, or at least it seems
16 you are. What is wrong with that?

17 THE FOREPERSON: Your Honor, courts that have looked
18 at this issue have found that the prospect of subjecting people
19 who have pled guilty to a crime but who have not yet been
20 sentenced could be inappropriate because the making of multiple
21 statements could lead to a basis for vacating pleas that have
22 already been entered.

23 THE COURT: Because they gave inconsistent statements
24 or lied under oath? Don't you want to know that in advance
25 before you cut a deal with someone?

1 THE FOREPERSON: Certainly, your Honor. But with
2 multiple proceedings going on -- to be clear, we are not
3 talking necessarily about all depositions or all statements.
4 The government would only be seeking a limited stay of
5 certainly depositions while allowing --

6 THE COURT: I don't understand the reason for it.

7 MR. FOLIO: The basis is the Courts have found it
8 appropriate to granted limited stays of discovery which are to
9 include statements of people who are under investigation,
10 whether or not they are actively cooperating with the
11 government now or may be in sensitive negotiations with the
12 government.

13 THE COURT: So what? I don't understand. They will
14 have to make some hard choices. And that's their problem, not
15 yours.

16 MR. FOLIO: Yes, your Honor. However, when the
17 government remains in sensitive negotiations with parties who
18 are the subject of its ongoing criminal investigation --

19 THE COURT: I wish you all the best. There is nothing
20 like sensitive negotiations, much better than insensitive ones.
21 But I still don't understand the reason for delay.

22 MR. FOLIO: Your Honor, again, the reasons for the
23 delay and exactly what the government is asking, the government
24 hopes to set forward for you to review in full briefs by the
25 end of this week, if that is all right your Honor. Then the

1 Court can make an evaluation of exactly what the government is
2 requesting and what the parties have agreed to and determine --

3 THE COURT: I'm not going to stay anything today. If
4 you want to make a submission, an ex parte submission, I will
5 certainly consider it. When do you want to do that by?

6 THE FOREPERSON: The government would be prepared to
7 file its motion on Friday, and that would include an ex parte
8 submission explaining --

9 THE COURT: You are making the motion now. I'm
10 denying it now based on what I have heard. If you want to move
11 for reconsideration based on an ex parte submission, I will
12 allow it.

13 MR. FOLIO: Yes, your Honor. May we make that
14 submission by Friday?

15 THE COURT: That's fine.

16 MR. FOLIO: Thank you, your Honor.

17 THE COURT: Nevertheless, in the expectation that the
18 Court will not stay anything, let's set a trial date also in
19 the expectation that there will be a single trial. I may be
20 persuaded to stay and I may be persuaded to bifurcate or have
21 two trials, but at least we will have a date in place if we go
22 forward. How long a trial are we talking about in plaintiffs'
23 view?

24 MR. HARVEY: Your Honor, at this point we would
25 estimate three weeks, speaking for DC 37. Speaking for

1 plaintiff DC 37, we would estimate three weeks.

2 THE COURT: I assume you are speaking for everyone
3 unless anyone here disagrees.

4 MS. NUSSBAUM: Your Honor, particularly if the Court
5 does order a joint trial here, we would say four weeks. There
6 are not going to be experts --

7 THE COURT: I don't understand. My experience,
8 forgive me, is that what the parties jointly estimate is
9 usually about twice as long as the trial takes, but it screws
10 up my schedule because I have to take the parties at their word
11 and then I find out I was misled. Why in the world would the
12 plaintiffs' case take four weeks?

13 MS. NUSSBAUM: Your Honor, particularly if the cases
14 are consolidated and there is one trial.

15 THE COURT: That's the assumption.

16 MS. NUSSBAUM: That is the assumption. If there is
17 one trial, there will be different experts. The economic
18 experts will be different. Experts will be different on
19 different issues in the direct purchaser and indirect purchaser
20 cases. There are different statutes at issue. The direct
21 purchaser case is just federal claims. The indirect purchaser
22 case will also have various state law claims. There will
23 likely be other expert issues here with respect to these
24 particular products.

25 With respect to pharmaceutical cases that have gone to

1 trial --

2 THE COURT: This is a jury case, right?

3 MS. NUSSBAUM: I understand that, your Honor.

4 THE COURT: What any litigator -- I shouldn't use that
5 term. What any trial lawyer knows is that it is critical for
6 both sides to simplify to prevent the jury from losing focus,
7 for matters that might be of interest to some arcane
8 cognoscenti of antitrust law to be totally forgotten about, and
9 the focus be on the things that a jury will be interested in.
10 Where counsel do not adhere to that, which in my experience
11 they almost always do, but if they don't, the Court has to set
12 time limits on witnesses to make sure that everything remains
13 focused.

14 I find it very difficult to believe it will take four
15 weeks for the plaintiffs' case, but I hear what you are saying.
16 Since you know the case and I don't, I will adhere to your
17 estimate. But I will be very disappointed if it in fact takes
18 four weeks.

19 Let's hear from defense counsel.

20 MS. NUSSBAUM: Thank you.

21 MS. ALLON: Your Honor, if the plaintiffs go for four
22 weeks, we would probably need four weeks too.

23 THE COURT: I can't imagine that. That's because you
24 want to repeat each and everything that has been said before?

25 MS. ALLON: Your Honor, the allegation is about two

1 separate conspiracies with respect to two separate products and
2 roughly ten different defendants.

3 THE COURT: So we'll put aside eight weeks for the
4 trial. That's why we are setting the trial date now because to
5 set an eight-week trial at the end of the case would not be
6 easily done. We'll start the trial on Wednesday, November 8th,
7 at 9:00 a.m. and continue without a break until the case is
8 completed. That should bring us in before Christmas.

9 Of course, if we get up the Christmas holiday and
10 counsel isn't completed, I'll be delighted, as I'm sure the
11 jury will, to tell the jury that because counsel couldn't
12 complete the case within their time estimate, we'll have to sit
13 after Christmas as well as. We will sit Monday through Friday
14 9:00 to 5:00.

15 Anything else we need to take up today? Yes?

16 MS. KATCHER: Good morning, your Honor. We have been
17 meeting and conferring with the defendants for the past week on
18 our first set of document requests. We are hoping to bring any
19 overarching disputes to you as soon as possible. I just wanted
20 to clarify that when we do so, I believe the procedure is just
21 to call your clerk and set up a time?

22 THE COURT: Since you are going to be in court this
23 Friday, maybe we should do it this Friday after the oral
24 argument on the motion to dismiss. Let me ask defense counsel,
25 how long do you think your initial argument on the motion to

1 dismiss is going to take?

2 MS. ALLON: Certainly under 30 minutes.

3 THE COURT: Let's assume, with back and forth, that
4 the oral argument takes no more than an hour and a half. I
5 think that is a reasonable assumption. I have one other favor
6 to ask in a minute. We'll take a pause, and then we will take
7 up any document disputes.

8 MS. KATCHER: Thank you very much, your Honor.

9 THE COURT: As you may recall, the class that I teach
10 in Columbia Law School on class actions is going to be present
11 to observe your oral argument on Friday. I thought -- if
12 anyone objects to this, that will be perfectly okay -- I
13 thought after the oral argument it might be nice to take about
14 15 minutes and have the lawyers talk to the class and answer
15 questions of the class not about the merits of the argument but
16 about what it's like to be an antitrust litigator, and so
17 forth. I think they would be fascinated to hear that. Is that
18 okay with everyone?

19 MS. NUSSBAUM: Your Honor.

20 MS. KATCHER: Yes.

21 MS. ALLON: Yes, your Honor.

22 THE COURT: Super. Anything else we need to take up
23 today? Very good. Thanks so much.

24 (Adjourned)

25